No. 11701

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as M. A. WYMAN LUMBER COMPANY; M. A. WYMAN, M. H. WYMAN and EDWARD DORAN, doing business as WYMAN MILL COMPANY, and M. A. WYMAN,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

REPLY BRIEF OF APPELLANTS

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Appellants had hoped, that it would not be necessary to file a Reply Brief in this case, but due to the many inaccuracies in Appellee's brief, which may be attributed to the fact that the present counsel for Appellee had no part in the proceedings herein, prior to the notice of appeal, and are therefore, unfamiliar with the pleadings and evidence in this case; we deem it necessary to clear up each of these inaccuracies as they appear in appellee's brief, in order that this

Court may know all the pertinent facts pertaining to the law involved in each of appellant's specification of errors.

Appellee says (pp. 1 and 2) that this action was commenced to recover treble damages "for alleged overcharges in the *sale of lumber*." It was commenced to recover treble damages (We omit the injunctive counts which were dismissed) for failure to obtain "authorization," in accordance with Maximum Price Regulation 539 (Count III, R. 6) and to recover for certain alleged overcharges for trucking, in accordance with Revised Maximum Price Regulation 26 (Count IV, R. 7). Appellee dismissed the trucking charge count, and then filed an *amended* complaint seeking treble damages for failure to obtain "special authorization as provided in MPR 539 (Count II, R. 17), a service regulation, which fixes prices for *services* to lumber. RMPR 26 is nowhere even mentioned in Count II (the damage count) of the amended complaint. So at that point in the controversy, the *only* violation alleged was failure to obtain special authorization as provided in MPR 539.

This amended complaint was aimed at Granite Falls Planing Mill, a corporation, the *only* defendant alleged to be engaged in planing or services to lumber. Granite Falls Planing Mill, M. H. Wyman and Edward Doran were dismissed from the amended complaint February 15, 1946, and *all the pleadings thereafter omitted* this corporation, and M. H. Wyman and Edward Doran as individuals.

It should be noted here, that the printed record (by

mistake of the printer) has failed to show this omission. They are *not* parties to this suit, and the pleadings so show.

Appellee (p. 2) refers to the allegations and proof of the *amended* complaint. This case was not tried on the amended complaint, but was tried on the second amended complaint (R. 39), which latter contains no such allegation as appellee claims.

Appellee states (p. 3) that "There are thirteen assignments of error, but counsel argues only nine of them." There are only eleven assignments of error (pp. 14 to 16, appellants' brief) and they were all argued. The ninth and tenth, however, were covered in the argument under the first eight specification of errors.

Appellee (pp. 4, 5 and 6) discusses at length certain provisions of MPR 539. For what purpose it does not appear, since Count II, the damage count, of the second amended complaint on which this case was tried, contains no reference to that regulation.

Appellee again (p. 7) refers to the *amended* complaint and (p. 8) states that it was "alleged that Granite Falls Planing Mill, Inc., was engaged in the business of *milling* western softwood lumber * * * which constituted a violation of MPR 539," and quotes the amended complaint at length, for what purpose does not appear.

Appellee says (p. 11) that "appellants offered no evidence to contradict any of appellee's witnesses," and that "there is no dispute in the essential facts."

Now, appellants' brief (p. 7) definitely stated the

pages in the record refuting that statement, and appellee has in no way challenged the testimony referred to in appellants' brief. Such general statements by appellee, without any reference to the record deserve small consideration.

Appellee states (p. 11) "the overcharges according to the undisputed testimony given by the witness, Joseph Rothfield, were $19,129.09. RMPR 26 itself refutes that statement.

Mr. Rothfield testified, that RMPR 26 establishes maximum prices for surfacing (planing) lumber (R. 124, 125, 126, 151, 152, 165) and that his calculation of $19,129.09 overcharges for services in *planing* this lumber is based on RMPR 26, Table 2 (R. 124, 130, 131, 132, 179, 180).

We challenged counsel (p. 26, appellant's brief) to disprove our statement, that "all lumber services, including planing are covered *only* by MPR 539."

Appellee (p. 12) attempts to show *how* Mr. Rothfield arrived at $19,129.09. He takes $22,955.44, the amount received by Granite Falls Planing Mill, Inc., for planing this lumber, and deducts $3,826.35 from that sum which leaves $19,129.09. *But where does he* get the $3826.35? Appellee didn't tell us, nor did Mr. Rothfield *ever* tell us, because RMPR 26 *fixes no price for planing lumber.* Therefore, Mr. Rothfield's computation of overcharges for *planing* lumber, based on RMPR 26 is erroneous.

Appellee, however (p. 13) attempts to express the alleged overcharges in "another way." But where does *it* get the $3826.35, and *where* does RMPR 26

provide any ceiling price for surfacing or planing lumber? Mr. Rothfield was unable to answer these questions (R. 151, 152).

True, RMPR 26 fixes the ceiling price for the sale of rough lumber and a higher price for the sale of planed or surfaced lumber, but the difference between these two figures is *not* the ceiling price for planing services. The ceiling price for services in planing lumber is fixed *only* by MPR 539, the regulation issued and in force for that purpose, and *used by appellants.*

Appellee says (p. 14) that all three complaints alleged violations of MPR 539 and RMPR 26. We cannot understand why appellee could be so careless with the facts, when an inspection of Count II of the second amended complaint, the only count now involved in this action, contains *no mention or even a reference to MPR 539.*

Appellee says (p. 16) that appellants' application to operate under MPR 539 was "refused." That is incorrect. In the first place, *appellants* never made any application to operate under MPR 539. The application was made by Granite Falls Planing Mill, Inc., but it was not refused. It was merely *returned* to the applicant (R. 196, 197) after the O.P.A. had kept it for over a year (R. 194 and 195) without any investigation (R. 175, 176, 177, 193, 194), knowing that in the *meantime* the applicant was operating under MPR 539 (R. 203, 235); and the evidence is *uncontradicted* that it was qualified and entitled to operate under MPR 539 (R. 174, 234, 235, 237, 238).

Their only excuse for returning this application was that MPR 539 "changed the qualifying requirements" of SSR 27 to MPR 165 (R. 196) when as a matter of fact a comparison of these two regulations will show that the qualifying requirements were *both exactly the same word for word* (R. 205, 206, 235, 236).

We believe the evidence clearly shows that this conduct of the O.P.A. is grossly unfair, and amounted to an estoppel.

Appellee says (p. 16) that the stipulation and evidence show that appellants sold surfaced lumber, but fails to mention *where* it may be found, either in the *stipulation or evidence.* As a matter of fact, the stipulation admits that *appellants* sold only rough lumber (R. 64) and that Granite Falls Planing Mill surfaced, invoiced and received payment for its services in planing this lumber. Such a sweeping statement by appellee cannot be justified by the record.

Appellee claims (p. 18) that the record is barren of any motion by appellants to make the complaint more definite and certain, or for a bill of particulars, and that even though the complaint failed to allege fraud or evasion, "appellee could prove these allegations by any method it saw fit." No authorities are cited, however, to justify that statement.

Now, as a matter of fact, a motion to make the second amended complaint more definite and certain and for a bill of particulars was presented and denied, and appellee has a copy thereof. It was not made a part of the record because it is not material.

Appellee should know that no motion by appellants, could have elicited the fact that appellee intended to further change the cause of action by attempting to prove fraud.

Appellee (pp. 18 to 21) sets out a portion of the typewritten transcript, quoting statements made at trial, not by any witness, but by the attorneys for the O.P.A., but omits a pertinent remark by the Court (p. 54, typewritten trans.).

> "THE COURT: That is the theory of the O.P.A. that the defendant should have known it. The O.P.A. must plead it, when they want the defendants to know it."

Appellee states (p. 22) that "Granite Falls Planing Mill was organized by these defendants as a corporation," but failed to state that it was organized long before either SSR 27 or MPR 539 was issued or became effective (R. 222, 230).

Appellee concludes (p. 23) that because the customers of Granite Falls Planing Mill ordered it to show M. A. Wyman Lumber Co. as shipper (R. 119) that M. A. Wyman and the other appellants are guilty of fraud and evasion, regardless of whether or not they knew of this arrangement.

Appellee finally states (pp. 23, 24) that the theory of plaintiff's action is the use made of Granite Falls Planing Mill as a "dummy" to violate MPR 539, "and nothing more." But appellee fails to set out any allegation of the second amended complaint to sustain that theory, or any proof to support it. The second amended complaint (Count II) on which this case

was tried. is based *solely on RMPR 26* and contains no mention of MPR 539. Therefore, by appellee's own admission it is a variation of the allegations of the second amended complaint.

While appellee admits (p. 23) that an officer of a corporation cannot be held personally liable for the acts of the corporation, yet it asks this Court to hold appellants liable for planing services performed by the corporation, for which the stipulation and evidence admit the corporation invoiced and received payment, both of which also admit that the corporation never sold *any* lumber. Therefore, how or in what way could this corporation be used to violate RMPR 26.

Appellee in effect urges this court to *assume* fraud, trickery and evasion, in spite of the invoices and stipulation. Even if evidence of fraud had been admissible, it still must be proven by clear and convincing testimony. Certainly the testimony of Mr. Rothfield, the only witness concerning fraud, does not fulfill those requirements.

Appellee says (p. 24) that it has "no quarrel with the authorities cited by appellants." The fact that appellee has seen fit to criticize only one (p. 14) of the forty-three authorities cited by appellants, and the further fact that it has referred to no evidence questioning the accuracy of appellants' brief, is indeed a tribute not enjoyed by many appellants.

Appellee says (p. 25) that the defense of estoppel is not available against the United States, and cites three cases in support of that statement.

The question of estoppel in the cases of *U.S. v.*

City and County of San Francisco, 106 F.(2d) 569, and *Korman v. Fed. Housing Adms.*, 113 F.(2d) 743, cited by appellee, was not involved in either of these two cases.

In *U.S. v. Stewart*, 121 F.(2d) 705, cited by appellee, which was an action by the United States to quiet title to certain marsh land, title to which the defendant claimed by prescription, the Court merely held that title to land belonging to the United States, cannot be acquired by prescription or laches on the part of the United States.

The estoppel in this case is not one based on laches, or one involving the construction of a regulation, but is rather one based on honesty and fair dealing. In such cases it was held in *U.S. v. Denver R. G. Ry.* (C.C.A. 8, 1926) 16 F.(2d) 374, that the United States or a state may be estopped.

Appellee also states (p. 25) that the defense of estoppel has not been pleaded.

The record shows (R. 181, *et seq.*) that this question was injected into this case by *appellee* (over appellants' objections) (R. 104, 113, 120, 121, 122) when it called Mr. Wurnsted, the head of the lumber division of the O.P.A., to show what became of the application of Granite Falls Planing Mill. His testimony showing estoppel was admitted on cross-examination without any objection by appellee (R. 195 to 198, 205 to 207). Therefore, it was not necessary to specially plead estoppel.

Appellee says (p. 27) "Of course these appellants were all partners in the two companies." This is in-

correct. M. H. Wyman and Edward Doran were partners *only* in Wyman Mill Company. The pleadings, evidence and stipulation so show. Appellee (p. 28) quoted a portion of the testimony of Mr. Doran, a witness on behalf of *appellee* (R. 115).

The *very next questions* asked by the Court were:

"THE COURT: Will you state that again please.

THE WITNESS: Our orders came from the *customer* to the Granite Falls Planing Mill authorizing us *how* to remanufacture that lumber, *how* to surface that lumber, whether we should re-saw it or plane it, mark it, grade it and load it on cars.

THE COURT: That was from the buyer you got that request?

THE WITNESS: That is right.

THE COURT: What lumber would he have you plane and saw and mark and so forth?

THE WITNESS: Well, the order would come to our mill, and we would have it (lumber) in the rough. Then we would not put that through the planer until such time as we got orders from the customers, instructing us what to do with that lumber.

THE COURT: You are speaking of the Granite Falls Planing Mill?

THE WITNESS: That is right." (R. 15)

Thus it is apparent that appellee's isolated statement (p. 27) that "orders came for the Wyman Mill Co." is not only meaningless, but misleading.

Appellee (p. 29) attempts to justify the entry of judgment against M. H. Wyman and Edward Doran,

by citing a portion of Sec. 236, Remington's Revised Statutes of the State of Washington, which deals with a situation where the defendants are "*jointly* indebted upon a *contract.*" Even if appellants violated any regulation, they are not jointly indebted, but are severally indebted, and in no event is the action based upon a contract, nor does this judgment provide that it may be enforced only against the partnership property.

Paragraph 2 of Sec. 236, however, provides as follows:

> "2. If the action is against defendants *severally* liable, he (plaintiff) may proceed against the defendants *served* in the same manner as if they were the only defendants."

In *Livingstone v. Lovegren,* 27 Wash. 102, cited by appellee, the plaintiff in that case waived the tort action, and brought suit on the contract.

In *Peha's University Food Shop v. Stimpson Corp.,* 177 Wash. 406, cited by appellee, the Court found that the garnishee defendant held property belonging to the two defendants *jointly* and that both defendants "were *jointly* indebted on contract to respondent." Even in that case, however, the judgment specifically provided that it could be satisfied only against the joint property of the two defendants, and the separate property of the defendant served.

The stipulation admits (R. 62) that this is a "penal action," and whether this case is decided under State or Federal law is immaterial, for both have held that:

"It is a settled rule that in order to sue a part-

nership, *each partner* must be personally served with process." (p. 36, appellants' brief)

The abatement of this suit as to M. H. Wyman and Edward Doran (R. 36) ended this action as to them in *every* capacity, and subsequent service on February 28, 1946 (R. 45) could not revive it.

We again repeat that there was no evidence even remotely connecting M. H. Wyman or Edward Doran with the violation of any regulation. Appellee's only answer to this, is (p. 30) "This, of course, is not the fact." But again it fails to produce any evidence to the contrary.

Appellee admits (p. 31) that "If counsel claimed surprise he had a right to a continuance," if he had asked for it. The Court clearly indicated (R. 107 to 111) that evidence of a change of the cause of action, and fraud would *not* be admissible under the issues in this case. Hence there was no reason then for appellants to insist upon a continuance.

Appellants' opening brief has carefully referred to the pages in the printed record, substantiating *every* statement made in their brief. The record speaks for itself. Many of appellee's statements, however, cannot be verified by the record, nor does appellee pretend to do so. It merely states its conclusions without any reference to any evidence to support them.

We confidently believe that the portions of the record referred to in appellants' opening brief will show:

1. That appellee changed the cause of action after the expiration of the one-year statute of limitations.

2. That appellee's figures of $19,129.09 or $19,-130.67, are erroneous.

3. That there is no evidence that appellants ever sold any surfaced lumber, or any other lumber except rough lumber, which the evidence and stipulation both admit are in accordance with RMPR 26.

4. That the only testimony concerning fraud or overcharges, is the conclusion of one witness, based solely on his imagination, and admittedly without *any* facts.

5. That there is no evidence that appellants used Granite Falls Planing Mill to violate RMPR 26.

6. That appellee has failed to connect M. A. Wyman with the sale of any surfaced lumber.

7. That the evidence amounts to an estoppel against appellee.

8. That there is no evidence of the violation of any regulation by M. H. Wyman or Edward Doran.

9. That this case should have been dismissed at the close of appellee's testimony for failure of proof.

10. That no judgment should have been awarded against appellants.

11. That the record shows surprise, which ordinary prudence by appellants could not have guarded against resulting in a failure of justice to appellants.

It is, therefore, respectfully submitted that the judgment should be reversed, or at least a new trial should be granted to appellants.

Respectfully submitted,

C. E. HUGHES,
Attorney for Appellants.